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No. 86-271

In The

Supreme Court of the United States

OCTOBER TERM, 1986

PAT S. HOLLOWAY,

Petitioner,

v.

JUDGE DEE BROWN WALKER, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT KELSOE'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF QUESTIONS PRESENTED

1. Whether the loser in a state court trial may obtain a review of the state court judgment in a United States district court by bringing a suit under 42 U.S.C. § 1983 alleging deprivation of property without due process in the state court trial.

2. Whether the rule enunciated in the *Parratt v. Taylor* and *Hudson v. Palmer* decisions of the United States Supreme Court applies to an alleged deprivation of property without due process in a state court trial when the state provides an appellate review process to correct errors made by the trial judge.

TABLE OF CONTENTS

	Page
STATEMENT OF QUESTIONS PRESENTED ...	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
CONSTITUTIONAL PROVISION AND STATUTE INVOLVED	2
JURISDICTION	2
STATEMENT OF CASE	2
SUMMARY OF THE ARGUMENT	8
REASONS FOR NOT GRANTING THE WRIT ...	8
I. THE LOWER FEDERAL COURTS HAD NO JURISDICTION IN THIS CASE BECAUSE PETITIONER'S CLAIMS REQUIRE REVIEW OF A STATE COURT DECISION	8
II. THE FIFTH CIRCUIT CORRECTLY APPLIED THIS COURT'S DECISIONS IN *PARRATT V. TAYLOR* AND *HUDSON V. PALMER* IN THIS CASE	12
III. THE FIFTH CIRCUIT'S DECISION DOES NOT CONTRADICT THIS COURT'S HOLDING IN *AETNA LIFE INSURANCE CO. V. LAVOIE* AND DOES NOT TRIVIALIZE THE RIGHT TO A FAIR TRIAL	18
IV. THE FIFTH CIRCUIT CORRECTLY FOLLOWED *PARRATT AND HUDSON* CASES INSTEAD OF THE HOLDINGS OF OTHER CIRCUITS, AND ANY DIFFERENCES BETWEEN THE CIRCUIT OPINIONS DO NOT WARRANT A GRANT OF THE WRIT OF CERTIORARI IN THIS CASE	20
CONCLUSION	23
CERTIFICATE OF SERVICE	24

TABLE OF AUTHORITIES

Page

Cases

Aetna Life Insurance Co. v. Lavoie, 106 S.Ct. 1580 (1986) 8, 14, 18

Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers, 398 U.S. 281 (1970) 9

Bretz v. Kelman, 773 F.2d 1026 (9th Cir. 1985) 21

Browning v. Navarro, 37 B.R. 201 (N.D. Tex. 1983), *rev'd*, 743 F.2d 1069 (5th Cir. 1984) 5, 6

Browning v. Placke, 698 S.W.2d 362 (Tex. 1985) 3

Daniels v. Williams, 106 S.Ct. 662 (1986) 13

Dennis v. Sparks, 449 U.S. 24 (1980) 14, 16

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) 7, 9

Ex parte Virginia, 100 U.S. 339 (1880) 14

Federal Trade Commission v. Cement Institute, 333 U.S. 683 (1948) 20

Holloway v. Walker, 784 F.2d 1287, *rehearing denied*, 790 F.2d 1170 (5th Cir. 1986) ..... *passim*

Holloway v. Walker, 800 F.2d 479 (5th Cir. 1986) 3

Home Telephone & Telegraph Co. v. Los Angeles, 227 U.S. 278 (1913) 15

Hudson v. Palmer, 468 U.S. 517 (1984) ..... *passim*

Humble Exploration Co. v. Browning, 677 S.W.2d 111 (Tex. App.—Dallas 1984), *opinion on rehearing en banc*, 690 S.W. 2d 321 (Tex. App.—Dallas 1985, writ ref'd n.r.e.), *cert. denied*, (1986) 2, 6, 17

In re Murchison, 349 U.S. 133 (1955) 19

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 15, 21, 22

TABLE OF AUTHORITIES — (Continued)

Page

Cases

Marshall v. Jerrico, Inc., 446 U.S. 238 (1980) 20

Monroe v. Pape, 365 U.S. 167 (1961) 14

National Communication Systems, Inc. v. Michigan Public Service Commission, 789 F.2d 370 (6th Cir. 1986), *cert. denied*, 55 U.S.L.W. 3208 (Oct. 6, 1986) 21

Parratt v. Taylor, 451 U.S. 527 (1981) ..... *passim*

Patterson v. Coughlin, 761 F.2d 886 (2nd Cir. 1985), *cert. denied*, 106 S.Ct. 879 (1986) 20

Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) 9

State Bar of Texas v. Howell, 674 F.2d 1027 (5th Cir. 1982), *vacated and remanded*, 460 U.S. 1065 (1983), *opinion on remand*, 710 F.2d 1075 (5th Cir. 1983), *cert. denied*, 466 U.S. 950 (1984) 11

Tumey v. Ohio, 273 U.S. 510 (1927) 19

Ward v. Village of Monroeville, 409 U.S. 57 (1972) 19

Statutes

42 U.S.C. § 1983 ..... *passim*

Constitutional Provisions

United States Constitution, Fourteenth Amendment ..... *passim*

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT KELSOE'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Kelsoe respectfully requests that this Court deny the Petition for Writ of Certiorari filed by Pat S. Holloway seeking review of the judgment of the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit's opinions are reported at 784 F.2d 1287, *rehearing denied*, 790 F.2d 1170 (5th Cir. 1986).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

U.S. Constitution, Amendment XIV:

> No State shall . . . deprive any person of life, liberty, or property without due process of law . . .

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

JURISDICTION

Petitioner has applied for a Writ of Certiorari to the Court of Appeals for the Fifth Circuit. There is no federal jurisdiction in this case because the federal district court had no subject matter jurisdiction to review a state court judgment.

STATEMENT OF THE CASE

This case was brought under 42 U.S.C. § 1983 and involves civil rights allegations that stem from two consolidated state court cases in which Petitioner Holloway was a Defendant. After losing in the original state court trial, Holloway pursued the full spectrum of state appellate remedies, appealing to the Texas Court of Appeals, where he lost, and then applying to the Texas Supreme Court for a Writ of Error, which was refused. He then applied to this Court for a Writ of Certiorari, which was also refused. *Humble Exploration Co. v. Browning*, 677 S.W.2d 111 (Tex. App. — Dallas

1984), *opinion on rehearing en banc*, 690 S.W.2d 321 (Tex. App. — Dallas 1985, writ ref'd n.r.e.), *cert. denied*, 106 S.Ct. 1376, (1986). In the present action, brought against the parties who were plaintiffs in the previous state court trial, their attorneys and other participants in that trial, Holloway attempted to collaterally attack the state court judgment via 42 U.S.C. § 1983.[1] Petitioner now seeks reversal of a summary judgment rendered against him by the federal district court and affirmed by the Fifth Circuit Court of Appeals.

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[1]This suit is only one of a number of collateral attacks Petitioner has made upon the single state judgment in both state and federal courts. He and other plaintiffs filed Cause No. 8066, styled *Jaehne, et al. v. Starnes, et al.*, on June 17, 1985, in the 21st Judicial District Court of Lee County, Texas. All Respondents in this case, except the APP Entities, are Defendants in that case, in which Holloway sought a declaratory judgment that the original state judgment rendered by the 162nd District Court of Dallas County, Texas, was "void," as well as other causes of action including trespass to try title, based on the proceedings and judgment in the prior state court action. Holloway as an attorney filed a second suit in Lee County on behalf of members of his family, alleging essentially the same claims, against certain of the Respondents here. After the state judge declared the original judgment void, the Texas Supreme Court conditionally granted an application for writ of mandamus requiring vacation of this order. *Browning v. Placke*, 698 S.W.2d 362 (Tex. 1985). The state court later dismissed the consolidated action for lack of jurisdiction. The case is currently on appeal to the Texas Court of Appeals in Austin, Texas, where Holloway continues to assert that the Dallas County judgment is void. Also, Holloway as an attorney for his daughter and royalty interest owners filed Cause No. CA3-84-0850-H, styled *Gregory, et al. v. Walker, et al.*, in the United States District Court for the Northern District of Texas, on May 25, 1984, against the Respondents in this case. The same conspiracy allegations that are contained in this suit were set forth in that case as a R.I.C.O. (18 U.S.C. § 1961) action. That case was dismissed on July 12, 1985. As for the federal courts, Holloway has sought a determination by the bankruptcy court in his individual bankruptcy case that the original state judgment was void, by reason of the same allegations made in this case, in the form of objections to the Browning Interests' claims for payment of their damages. He has also sought relief in original proceedings in the Fifth Circuit, including a habeas corpus action, alleging, among other claims, that he had diplomatic immunity from state court suit because he was an honorary Bolivian consul. The Fifth Circuit has rejected these claims. *Holloway v. Walker*, 800 F.2d 479 (5th Cir. 1986).

Respondent Kelsoe is in this case because he was an attorney for the winning side in the state court trial. By bringing this action, Petitioner seeks to steal victory from the jaws of defeat by claiming that that judgment should be set aside and declared "void and of no force and effect" because Petitioner was allegedly deprived of his property without due process because Respondents allegedly conspired against Holloway to "fix" the jury trial in violation of 42 U.S.C. § 1983. (Petitioner's Appendix, hereinafter Pet. App., at A-25.)

The first state court case, styled *Browning v. Holloway*, Cause No. 79-9623-I, was filed on September 11, 1979, by the Brownings, defendants and Respondents in the present case, who sought recovery from Holloway, Humble Exploration Co. and others for breach of fiduciary responsibility and fraud, asking damages and the imposition of a constructive trust on certain assets. This case was assigned to the 193rd Judicial District Court of Dallas County, Texas. After Holloway and Humble filed Chapter 11 voluntary bankruptcy petitions on November 19, 1979, they removed the state court case to the United States Bankruptcy Court, which remanded the case back to the state court on January 18, 1980. On May 26, 1982, a second state court case, styled *Fairway Land Company, et al., v. Humble Exploration Company, et al.*, No. 82-5742-I, was filed and randomly assigned to Judge Walker of the 162nd Judicial District Court of Dallas County, Texas. Plaintiffs in that case were a group of investors, including APP Entities (petroleum companies and partnerships that together are Respondents here) who sued because Humble had shut in a number of wells in which they had interests. This suit requested the appointment of a receiver. The Brownings were defendants in this suit, due to their claims against Holloway and Humble, but they were later realigned as plaintiffs.

The two actions were consolidated in the court of Judge Walker, who appointed a receiver. Holloway filed a Motion for Recusal against Judge Walker, in which he alleged bias and conflict of interest, as again alleged in this § 1983 action. Pursuant to Texas procedure, this motion was heard by another judge, who denied it after an extensive evidentiary hearing. The case was then tried to a jury before Judge Walker. The trial lasted more than six weeks and ended with findings by the jury adverse to Holloway.

On November 11, 1982, judgment was entered granting the Brownings $72 million damages from Holloway and imposing a constructive trust over all of the stock of Humble and Sterling Pipeline Company.

Holloway and the other state court defendants perfected an appeal from that judgment on November 24, 1982. No supersedeas bond to stay the enforcement of the state court judgment was filed. The trustee of the bankruptcy estate refused to turn over the property subject to the state court judgment, and the Brownings then brought a turnover suit to force the trustee to turn over the property. In their counterclaim, the trustee and Holloway contended that the state court judgment was void, claiming the state court had no jurisdiction due to violation of the bankruptcy court's remand order and the remand was not effective. The United States District Court held that the state court judgment was indeed void. *Browning v. Navarro*, 37 B.R. 201 (N.D. Tex. 1983).

At that time, Holloway's state court appeal of the original judgment was also proceeding. After the federal district court held that the state court judgment was void, the Texas Court of Appeals dismissed the appeal, reasoning essentially that Holloway had elected an inconsistent remedy in federal court. The court noted that the grounds of the federal

district court's opinion that the state court judgment was void — that the trial court had no jurisdiction because of the remand provisions — had not been presented to the trial judge, but was presented for the first time on appeal. It found that continuation of the state court appeal was "a two-fold hardship" because essentially the same judgment was being reviewed in both federal and state systems. *Humble Exploration Co. v. Browning,* 677 S.W.2d at 113.

Holloway's motion for rehearing of the dismissal of the appeal was denied on September 7, 1984. Then, on October 1, 1984, the Fifth Circuit reversed the federal court's decision, holding the state court judgment was not void because the remand order had been satisfied. *Browning v. Navarro,* 743 F.2d 1069 (5th Cir. 1984). On October 3, 1984, Holloway filed a motion in the state appellate court for relief from its order dismissing the appeal. The court first reinstated the appeal and then set aside the reinstatement for violation of the Texas procedural rules and for being unwarranted on the merits. The Texas Supreme Court denied the appellants' application for writ of error, and this Court denied their Petition for Writ of Certiorari.

In his state court appeal, Petitioner argued that the failure to recuse Judge Walker deprived him of procedural due process. The alleged violations of his due process rights due to bias, corruption and unfair trial were also asserted by Holloway in his Petition for Writ of Certiorari in this Court on the dismissal of his appeal from the judgment against him (Cause No. 85-1182).

The present 42 U.S.C. § 1983 action was filed in the federal district court just prior to the perfection of the state court appeal. Holloway, Humble, Sterling and the trustee sought a declaratory judgment that the state court judgment was void for lack of due process and a permanent injunction

against the defendants from taking any further action in the state court case or attempting to collect on the state court judgment, as well as compensatory and punitive damages, among other relief. These plaintiffs alleged that the Brownings, their attorneys and others had conspired with Judge Walker to steal the plaintiffs' assets through the conduct of a rigged trial. After several years of discovery, all defendants filed motions for summary judgment on the grounds that the plaintiffs failed to state a cause of action under 42 U.S.C. § 1983 and that the evidence failed to show an issue of fact regarding their alleged involvement in a conspiracy. The district court granted Respondent Ayres' motion with respect to procedural due process claims but held that the plaintiffs had stated claims of substantive due process that would not be dismissed. (Pet. App. A-39). The district court also held that it did not have subject matter jurisdiction to review the state court judgment, based on this Court's decision in *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983) (Pet. App. A-36-38). On reconsideration, the district court agreed that the claims dealt with procedural due process. It granted all the motions for summary judgment, dismissing plaintiffs' claims, based on this Court's decisions in *Parratt v. Taylor,* 451 U.S. 527 (1981), and *Hudson v. Palmer,* 468 U.S. 517 (1984). (Pet. App. A-17).[2]

Holloway appealed to the Fifth Circuit Court of Appeals, which affirmed the federal district court's grant of summary judgment, holding that under *Parratt* and *Hudson,* the appellants were not deprived of property without due process. (A-16.) *Holloway v. Walker,* 784 F.2d 1287, *rehearing denied,* 790 F.2d 1170 (5th Cir. 1986). The Petition for

[2]At the time Ayres' Motion for Summary Judgment was granted, on April 18, 1985, the district court had already granted the Brownings' Motion for Summary Judgment on March 28, 1985. The court found that the Plaintiff had not produced sufficient evidence of conspiratorial agreement or conduct by the Brownings "after years of discovery."

Rehearing was denied in a Fifth Circuit opinion filed May 30, 1986. (A-60.). The Petition for Writ of Certiorari followed.

SUMMARY OF THE ARGUMENT

This Court should not grant the writ in this case for several reasons. The lower federal courts had no subject matter jurisdiction over this case in the first place, inasmuch as Petitioner's constitutional allegations are inextricably intertwined with the legal determinations of a state court and would necessarily require those federal courts to review that state judgment, which they may not do. This lack of subject-matter jurisdiction alone precludes any need for this Court to hear this case.

Moreover, the Fifth Circuit correctly applied this Court's opinions in *Parratt v. Taylor,* 451 U.S. 527 (1981), and *Hudson v. Palmer,* 468 U.S. 517 (1984), in granting summary judgment to Respondents. All the elements required for application of the *Parratt-Hudson* rule are present in this case. The decision here does not conflict with this Court's decision in *Aetna Life Insurance Co. v. Lavoie,* 106 S.Ct. 1580 (1986), which involved a direct appeal to this Court of a state judgment on due process grounds and included no issues raised by the *Parratt-Hudson* rule. Cases from other circuits, which Petitioner claims conflict with the Fifth Circuit opinion in this case, are clear contraventions of the holdings of *Parratt* and *Hudson* themselves. Thus, this Court has no need to grant the Writ of Certiorari in this case.

REASONS FOR NOT GRANTING THE WRIT

I. THE LOWER FEDERAL COURTS HAD NO JURISDICTION IN THIS CASE BECAUSE PETITIONER'S CLAIMS REQUIRE REVIEW OF A STATE COURT DECISION.

While the Fifth Circuit's opinion in this case turns on due process in light of the *Parratt-Hudson* rule, the case presents a much more basic jurisdictional situation that precludes any need for review by this Court. Holloway's claims in this case would require the lower federal courts to review the state court's legal determinations in the original state court action, which they have no jurisdiction to do.[3]

Lower federal courts possess no power whatever to sit in direct review of state court decisions. *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 482 n. 16 (1983); *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers,* 398 U.S. 281 (1970). They have no jurisdiction over challenges to state court decisions in particular cases arising out of judicial proceedings, even if those challenges allege that the state court's action was unconstitutional. *Feldman,* 460 U.S. at 486. One who is aggrieved by a state court's decision allegedly violating a federal right may seek vindication of this federal right in the state appellate courts and ultimately in this Court, if necessary. *Atlantic Coast Line,* 398 U.S. at 296. Federal review of such state court decisions may be had only in this Court. *Feldman,* 460 U.S. at 486; *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923).

In *Feldman,* this Court set out its test for determining when the federal court is being asked to review a state court decision:

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[3]Although this issue was before the Fifth Circuit, that Court chose to discuss only the *Parratt-Hudson* rule in its opinion. However, the Fifth Circuit's denial of relief to Holloway in his related habeas corpus proceeding was based on this point. The Court held, "The inferior courts of the United States lack jurisdiction to test Petitioner's claim that the challenged state judgments are constitutionally invalid." (Appendix to Brief of Respondents Browning Interests and Ayres, page A-2.)

> If the constitutional claims presented to a United States district court are inextricably intertwined with the state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the district court is in essence being called upon to review the state-court decision. This the district court may not do.

460 U.S. at 482 n. 16.

In his Petition for Writ of Certiorari, Petitioner states that the question here is "whether the harms [Judge Walker] visited upon Petitioner were brought about through his conduct of a trial, his entry of an award of damages, his imposition of receiverships and constructive trusts, and his rendering of a judgment n.o.v. ..." (Petition at 14). The Complaint in this case is threaded with allegations that Judge Walker consistently ruled against Petitioner on important evidentiary matters, made legally erroneous comments, took actions with no valid reason, allowed irrelevant questions that were highly prejudicial to Petitioner, made statements intended to prejudice Petitioner in the eyes of the jury, granted all the opposition's special issues and overruled all Petitioner's objections to them, and that adverse rulings as a whole amounted to an instructed verdict and deprived Petitioner of a meritorious defense. (R. Vol. 19, "A", pages 35-40). The federal district court noted that "virtually all of [the trial improprieties alleged in this suit], including the allegations of bias, are among the 211 points of error urged on appeal from the state court trial," concluding that the acts allegedly "evidencing and causing the deprivation are, for the most part, errors of law on appeal." (Pet. App. A-30.)

Petitioner apparently wishes to argue that the entry of a judgment n.o.v. by Judge Walker, for example, is evidence of

his participation in a conspiracy to deprive Petitioner of his property.[4] The issue before the federal court would be whether the judgment was justified based on the facts and law before Judge Walker. To claim that this act, and the others complained of, evidence a deprivation of property without due process is to inextricably intertwine the constitutional claims with the state court's decision in a judicial proceeding. In essence, the district court is being asked to review the state court judgment. As in *Feldman*, this review is impermissible. The district court had no jurisdiction. *Feldman*, 460 U.S. at 486.

This Court has applied the *Feldman* ruling to a § 1983 action including a claim of unfair trial in vacating and remanding for reconsideration in light of *Feldman* the Fifth Circuit decision in *State Bar of Texas v. Howell*, 674 F.2d 1027 (5th Cir. 1982), *vacated and remanded*, 460 U.S. 1065 (1983), *opinion on remand*, 710 F.2d 1075 (5th Cir. 1983), *cert. denied*, 466 U.S. 950 (1984). The plaintiff in that case, an attorney, brought a § 1983 action complaining that a disciplinary proceeding brought against him in state court violated the United States Constitution and seeking declaratory and injunctive relief. Among other things, he claimed that he was deprived of his right to a jury trial and his right to a fundamentally fair trial in the state court proceeding. On remand after this Court vacated the original reversal of the district court's dismissal, the Fifth Circuit analyzed the plaintiff's claims in light of *Feldman*, as required by this Court, and found that these claims were

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[4]The judgment in the state court case was not in fact a judgment n.o.v. The judgment was based on jury findings favorable to the plaintiffs in that case. The fact that the jury did not find for the plaintiffs on two jury issues on which they had the burden of proof is not an affirmative jury finding favorable to the defendants. Multiple findings favorable to the state court plaintiffs supported the judgment.

"inextricably intertwined with the state court's decision in a judicial proceeding." 710 F.2d at 1077. With respect to all the plaintiff's claims except his attack on the constitutionality of the state bar disciplinary scheme, the Fifth Circuit said, "[Plaintiff] has done nothing more than ask the district court to sit as an appellate court and review the state court judgment." *Id.*

If Petitioner successfully invokes jurisdiction of the federal district court here, then any disgruntled, losing litigant is offered the possibility of avoiding the effect of a judgment against him in state court, even after he has directly attacked the state court's judgment all the way through the state court system and has been turned away from the doors of this Court. All he need do is claim the state judge conspired with the winning litigants to deprive him of his property without due process of law. He then can obtain an additional review of his lost case in the guise of examining the propriety and merits of the state judge's actions and decisions. Such is not the intention of 42 U.S.C. § 1983. The district court had no subject matter jurisdiction over this case, so this Court has no need to grant the Writ of Certiorari to hear the Fourteenth Amendment due process issue raised by Petitioner.

II. THE FIFTH CIRCUIT CORRECTLY APPLIED THIS COURT'S DECISIONS IN *PARRATT V. TAYLOR* AND *HUDSON V. PALMER* IN THIS CASE.

This Court's decisions in *Parratt v. Taylor*, 451 U.S. 527 (1981), and *Hudson v. Palmer*, 468 U.S. 517 (1984), refined the concept of what constitutes a sufficient allegation of a violation of the Fourteenth Amendment Due Process Clause. *Parratt* established that if a deprivation of property was not due to an established state procedure but was

caused by the random and unauthorized act of a state agent, making predeprivation process impracticable because the state cannot know when such deprivations will occur, and if postdeprivation remedies provided by the state are adequate, the person has not been deprived of property without due process of law. Although *Parratt* dealt with a negligent deprivation, the *Hudson* decision extended the *Parratt* rule to unauthorized intentional deprivations of property by state employees acting under color of law.[5] 104 S.Ct. at 3204.

Petitioner apparently claims *Parratt-Hudson* is inapplicable here because Judge Walker could have provided adequate predeprivation process but allegedly did not. On the contrary, this case is closely analogous to *Hudson*. It presents a claim for procedural due process violations due to the alleged *intentional* misconduct of a state agent, in this case a state judge. As in *Parratt* and *Hudson*, the state could not possibly know when such misconduct was likely to occur. The alleged deprivation was not due to the operation of an established state procedure; rather the entire case revolves around allegations that the state judge did not follow state procedures. The availability of the appellate system offered Petitioner process that could restore all his property to him before he was finally deprived of it.

Petitioner apparently argues that because the state acts through its agents and employees, an allegation that a state judge has abused his power is automatically sufficient to allege a due process violation in a 42 U.S.C. § 1983 action. This argument confuses the inquiries required by § 1983.

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[5]This Court has recently held that the due process clause is not implicated by the merely negligent act of an official causing unintended loss of or injury to life, liberty or property, overruling *Parratt* in that narrow context. *Daniels v. Williams*, 106 S.Ct. 662, 663 (1986). The present case involves allegations of intentional deprivation of property, so the general rule formulated in *Parratt*, as extended in *Hudson*, is applicable.

In citing this Court to *Dennis v. Sparks*, 449 U.S. 24 (1980), which involved only the question of whether private persons who allegedly conspired with a state judge acted under color of state law,[6] Petitioner apparently equates the finding that an action was "under color of state law" in a § 1983 action with a determination that the alleged deprivation was without due process. Whether the complained-of act was action "under color of law" is an entirely different question from that of whether there was a deprivation without due process of law; these issues are two separate, essential elements of § 1983. Indeed, the Court in *Parratt* noted the dual nature of the inquiry:

> Since this Court's decision in *Monroe v. Pape*, [365 U.S. 167 (1961)], it can no longer be questioned that the alleged conduct by the petitioners in this case satisfies the "under color of law" requirement. Petitioners were, after all, state employees in positions of considerable authority. They do not seriously contend otherwise. Our inquiry, therefore, must turn to the second requirement — whether respondent has been deprived of any right, privilege or immunity secured by the Constitution or laws of the United States.

451 U.S. at 535-36.

Likewise inapposite is Petitioner's citation of *Ex parte Virginia*, 100 U.S. 339 (1880), dealing with Congress' power to impose criminal penalties on state government officials

[6]Traditionally, this Court does not undertake to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. *Aetna Life Ins. Co. v. Lavoie*, 106 S.Ct. 1580, 1588 n.4 (1986). Since the question before the Court in *Dennis* involved only the "under color of state law" requirement, Petitioner's claim that the Court impliedly negated the applicability of *Parratt-Hudson* to a alleged conspiracy with a state judge, in a case that entirely predated *Parratt*, is unwarranted.

for discriminating on the basis of race, and *Home Telephone & Telegraph Co. v. Los Angeles,* 227 U.S. 278 (1913), dealing with the question of whether an action had to be found to comply with a state constitutional provision analogous to the Fourteenth Amendment before it could be challenged on Fourteenth Amendment grounds. Neither case has any relevance to the determination of what constitutes due process for § 1983 purposes. The opinion below does not conflict with these cases.

As this Court stated clearly in *Parratt,* it is of no consequence that the individual state employee who intends to effect the alleged deprivation can, of course, foresee it. "The controlling inquiry is solely whether the State is in a position to provide for predeprivation process." 104 S.Ct. at 3204. The fact that the person who allegedly intentionally effects the deprivation is a state actor for the purposes of the "under color of state law" inquiry has no bearing on the issue of whether his act was "random and unauthorized" for purposes of the application of the *Parratt-Hudson* rule.

Petitioner seizes upon the requirement that the deprivation be "unauthorized" in order for the *Parratt-Hudson* rule to be applicable and claims that because the alleged state actor, in this case a judge, was "authorized" by the state to perform the functions of a judge, such as entering judgments and awarding damages, he was "authorized" to do the alleged acts in this case, i.e., enter judgment for one side pursuant to conspiracy instead of the merits of the case.[7]

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[7]Petitioner also claims that *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982), should apply here instead of *Parratt-Hudson* because the alleged deprivation was due to "an established state procedure," i.e., a trial. This Court made clear the meaning of "an established state procedure" in *Logan. Logan* dealt with deprivation of property pursuant to the operation of an inherently inadequate state procedure: Having mistakenly

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This interpretation ignores the clear purpose of the *Parratt-Hudson* requirement that the act be "random and unauthorized": To determine whether the state could possibly know when such deprivations will occur so as to practicably provide a predeprivation remedy. As this Court noted in *Hudson:*

> The state can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct. Arguably, intentional acts are even more difficult to anticipate because one bent on intentionally depriving a person of his property might well take affirmative steps to avoid signalling his intent.

104 S.Ct. at 3203.

The fact that a state "authorized" a judge to deprive a litigant of property by entering a judgment would not enable the state to predict an abuse of this power and provide a predeprivation remedy. The fact that a judge's act must have been a "judicial" one in order for him to claim judicial immunity, *Dennis v. Sparks,* 449 U.S. 24, 29, (1980), is obviously irrelevant to this inquiry.

The adequacy of the state remedies is not determined by the fact that they may give different relief or relief less in

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failed to hear an employment discrimination complaint within the statutory time period, an Illinois commission lost jurisdiction under the statute, depriving the complainant of his cause of action without due process. This Court distinguished *Parratt* by stating that in *Logan* it was the state system itself, an established state procedure, that destroyed Logan's property interest by operation of law. *Id.* at 435-36. Logan was challenging the state procedure itself, not the error by state officials that triggered the deprivation under the procedure. *Id.* The plaintiff in the present case, Petitioner, was not challenging the state procedure but the judge's allegedly illegal acts.

amount than that the plaintiff could receive in a § 1983 action. *See Hudson*, 104 S.Ct. at 3204. Nor is such adequacy affected by the plaintiff's failure to utilize these remedies or to make effective use of them. In the present case, Petitioner utilized his appeal rights and lost his case because the Texas courts viewed his simultaneous pursuit in federal court of a declaration that the state judgment was void, on grounds not asserted in the state court, to be an election of the federal remedy and a trifling with the state courts. *Humble Exploration Co. v. Browning*, 677 S.W.2d 111 (Tex. App. — Dallas 1984), *opinion on rehearing in banc*, 690 S.W.2d 321 (Tex. App. — Dallas 1985, writ ref'd n.r.e.), *cert. denied*, 106 S.Ct. 1376 (1985). Petitioner now claims that he was denied access to the state's appellate system and that the state remedy was not "meaningfully" available to him. (Petition at 20 n. 31.)

The availability of state process to correct alleged deprivations must not be confused with Petitioner's success in pursuing them. That a plaintiff by his own negligent or intentional acts waives or loses his remedy does not create a § 1983 cause of action. In *Parratt*, the prisoner-plaintiff failed to use state procedures in existence at the time of his loss. This Court's dismissal of the case was based on the availability of the state procedures at the time, not the plaintiff's success in pursuing them. 451 U.S. at 543.

This case presented to the Fifth Circuit an eminently suitable situation for application of the *Parratt-Hudson* rule. Because that rule was properly applied in this case, this Court should not grant the writ.

III. THE FIFTH CIRCUIT'S DECISION DOES NOT CONTRADICT THIS COURT'S HOLDING IN *AETNA LIFE INSURANCE CO. V. LAVOIE* AND DOES NOT TRIVIALIZE THE RIGHT TO A FAIR TRIAL.

Petitioner claims that the Fifth Circuit's holding "trivializes" the right to a fair trial, arguing that it contradicts this Court's recent decision in *Aetna Life Insurance Co. v. Lavoie,* 106 S.Ct. 1580 (1986), and earlier cases. On the contrary, the Fifth Circuit's holding in no way detracts from this right but merely follows *Parratt* and *Hudson* in analyzing what the state must do to provide all the process necessary to secure this right to its citizens. Unlike this case, *Lavoie* was not a § 1983 case but a direct attack on an Alabama Supreme Court decision, which the appellants there sought to overturn. This Court vacated the judgment and remanded for further proceedings because the state supreme court justice who cast the deciding vote was plaintiff in two other lawsuits involving the issue in *Lavoie* and his decision directly enhanced the legal status and the settlement value of his own case. 106 S.Ct. at 1586. *Lavoie* in no way presented any issue relating to the availability and adequacy of state procedures to safeguard the plaintiff's rights, in the *Parratt-Hudson* sense.

Petitioner Holloway's claims were in the *Lavoie* posture of a direct review when he appealed the state court judgment to the Texas appellate courts and then petitioned this Court for Writ of Certiorari. In the state appellate courts he argued that the state court erred in denying his motion to recuse Judge Walker for bias and conduct of alleged *ex parte* meetings, claiming deprivation of procedural due process. If the denial of recusal had been found erroneous, he would

have been entitled to a new trial and a different judge. In seeking direct review in this Court, Petitioner also raised his constitutional claim that he was denied a fair trial in state court.[8] This Court denied the Petition. The context of the consideration of these claims of unfair trial is the same as the review accorded in *Lavoie, Ward v. Village of Monroeville,* 409 U.S. 57 (1972), *In re Murchison,* 349 U.S. 133 (1955), and *Tumey v. Ohio,* 273 U.S. 510 (1927), in that all of these cases raised the issue on direct review. These decisions shape the right to a fair trial, but they do not determine whether a cause of action for a procedural due process violation is stated under 42 U.S.C. § 1983 because the state has not provided adequate process, the *Parratt-Hudson* inquiry.[9]

Petitioner claims much wider sweep for *Lavoie* than it claims by its own terms. Under Petitioner's interpretation, a state court decision that is reversed on appeal because it is found that the trial judge should have been recused would present a § 1983 cause of action. This expansion of § 1983

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[8]One of the questions posed to this Court by Petitioner in his Petition for Writ of Certiorari on direct review of the state court judgment was the following:

> Were Petitioners' rights under the Due Process Clause of the Fourteenth Amendment to the federal Constitution denied when a Texas Court of Appeals dismissed their pending appeal from a judgment rendered against them in the Court of first instance by a biased and corrupted judge following an unfair trial, on the ground that Petitioners forfeited their appeal by unsuccessfully collaterally attacking the validity of that judgment when Respondents sued to enforce it in federal court?

Petition for Writ of Certiorari, *Humble Exploration, Inc. v. Browning,* No. 85-1182.

[9]Petitioner also appears to claim that the right to an impartial tribunal is substantive due process. This Court has always considered the requirement of judicial impartiality to be a matter of procedural due process. In

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cannot have been intended by this Court to be read into *Lavoie*, which after all is not even a § 1983 case. The Fifth Circuit's opinion establishes that allegations of unfair trial against a trial judge must be resolved in direct review. *Lavoie* is not inconsistent with this opinion.

IV. THE FIFTH CIRCUIT CORRECTLY FOLLOWED THE *PARRATT* AND *HUDSON* CASES INSTEAD OF THE HOLDINGS OF OTHER CIRCUITS, AND ANY DIFFERENCES BETWEEN THE CIRCUIT OPINIONS DO NOT WARRANT A GRANT OF THE WRIT OF CERTIORARI IN THIS CASE.

Petitioner cites two cases from other circuits that he alleges conflict with the Fifth Circuit Court of Appeals' decision in this case. In fact, the holdings of these cases clearly conflict with *Parratt* and *Hudson* themselves in the senses in which Petitioner seeks to use them. The fact that two other circuits have misapplied Supreme Court precedent creates no need for this Court to hear a case in which the lower court has correctly applied the same precedent.

The Fifth Circuit correctly noted that the points in *Patterson v. Coughlin*, 761 F.2d 886 (2nd Cir. 1985), *cert. denied*,

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Marshall v. Jerrico, Inc., 446 U.S. 238, 242-43 (1980), the Court discussed the need for a neutral tribunal:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of *procedural* due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision-making process.

(emphasis added). *See Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 702 (1948) (characterizing Court's decision in *Tumey* as finding a violation of procedural due process).

106 S.Ct. 879 (1986), and *Bretz v. Kelman,* 773 F.2d 1026 (9th Cir. 1985), on which the petitioner relies, conflict with the holdings of *Parratt* and *Hudson* themselves. *Patterson's* holding that whether conduct of a state official was "random" or "unauthorized" for *Parratt-Hudson* purposes must be "viewed from the position of one who possesses the state-delegated authority to grant a hearing when circumstances and the Constitution so require" is clearly contradicted by the United States Supreme Court's express rejection of a similar argument in *Hudson,* where the respondent contended that because an agent of the state who intended to deprive a person of his property *can* provide predeprivation process, then he must do so as a matter of due process. This Court in *Hudson* stated that this argument reflected a fundamental misunderstanding of *Parratt* and that whether an individual employee himself was able to foresee a deprivation was of no consequence; the controlling inquiry was solely whether "the state is in a position to provide for predeprivation process." 104 S.Ct. at 3204. Since in *Hudson* it was the state agent himself who both had the opportunity to provide predeprivation process and who intended to deprive the respondent of his property, the decision in *Hudson* squarely contradicts the Second Circuit's analysis in *Patterson.*

As for *Bretz,* none of the essential holdings of that case, on which Petitioner here relies, are supported by *Parratt, Hudson* or *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1984). The Ninth Circuit's conclusion that a conspiracy cannot be a random act uses semantics to dodge *Hudson's* clear holding that an intentional deprivation of property is subject to the rule enunciated in *Parratt*. A conspiracy is, of course, intentional.

This Court recently denied certiorari in a Sixth Circuit case that rejected similar reasoning. In *National Communication*

Systems, Inc. v. Michigan Public Service Commission, 789 F.2d 370 (6th Cir. 1986), *cert. denied*, 55 U.S.L.W. 3208, 3235 (Oct. 6, 1986), the plaintiffs argued that allegations of conspiratorial acts on the part of public officials, whose duty it was to see that plaintiffs were not denied due process, were different from the random and unauthorized acts of misconduct that require a showing of the inadequacy of state remedies under *Parratt*. 789 F.2d at 372. The Sixth Circuit stated that the reasoning of *Parratt* appears to extend to all § 1983 cases claiming a procedural due process injury to a property interest. *Id.* at 372-73.

The Ninth Circuit's conclusion in *Bretz* that *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1984), extends to an illegal conspiracy case is equally mystifying. *Logan* did not involve "abuse of an established state procedure," as the *Bretz* court stated, but the operation of an inherently inadequate state procedure. The procedure itself deprived the claimant of his rights if the employment commission failed to act within the statutory period for any reason. The claimant challenged the system, not the failure of the Commission to act.

Finally, the *Bretz* court's holding that *Parratt* and *Hudson* apply only to minor deprivations is completely unsupported by these cases. Such a limitation would divide the cases' focus: The court would have to decide not only "Did the plaintiff adequately allege a deprivation of his property without due process of law?" but also "Was the property interest of which the plaintiff was deprived sufficiently insignificant?" The *Parratt* and *Hudson* opinions nowhere indicate that the Court followed such an analysis.

Where the decisions of other circuits are clearly unsupported by the United States Supreme Court decisions on

which they purport to be based, the claim by Petitioner that they conflict with the decision of the court below in this case presents no compelling reason for this Court to hear this case. The Fifth Circuit correctly applied the law in this case. The Petition for Writ of Certiorari should be denied.

CONCLUSION

For the reasons set out herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, R. Brent Cooper, counsel of record for Respondent G. H. Kelsoe, Jr. and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served three copies of Respondent Kelsoe's Response to Petition for Writ of Certiorari on all parties required to be served, by depositing three copies of Respondent Kelsoe's Response to Petition for Writ of Certiorari in the United States mail, on this _____ day of November, 1986, with first class postage prepaid, addressed to the listed counsel of record at the addresses indicated.

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